6 Otto 727

Oct T. 1877

No. 6 ORIGINAL.—OCTOBER TERM, 1877.

U. S. Supreme Court.

EX PARTE IN THE MATTER OF

A. ORLANDO JACKSON,

Petitioner.

Petition for Writs of Habeas Corpus and Certiorari.

RECORD.

Containing Rule to Show Cause, Petition, Exemplified Copy Record in Circuit Court, and Opinion of Judge Blatchford.

A. J. DITTENHOEFER,
(Tribune Building, New York.)

LOUIS F. POST,
(59 Liberty St., New York.)
Counsel for Petitioner.

New York:
HENNESSY & CO., LAW & JOB PRINTERS, 34 PARK ROW.
1878.

Supreme Court

OF THE UNITED STATES.

No. 6, ORIGINAL—OCTOBER TERM, 1877.

Ex parte in the matter of
A. ORLANDO JACKSON,
Petitioner.

Petition for Writ of Habeas Corpus and Certiorari.

Upon the petition of A. Orlando Jackson and the exhibits thereto attached,

It is hereby ordered that cause be shown before this Court, at Washington, in the District of Columbia, on the 22d day of April, 1878, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a Writ of Habeas Corpus and a Writ of Certiorari should not issue pursuant to the prayer of the petition.

And it is further ordered that a copy of this rule and of the petition and exhibits be served upon the Attorney General of the United States, the United States Attorney for the Southern District of New York, and the Marshal and the Clerk of the Circuit Court for said District, at least ten days before the return day of this rule.

26th March, 1878.

To the Supreme Court of the United States :—

The petition of A. Orlando Jackson respectfully shows :—

I. That he is now imprisoned or restrained in his liberty by Louis F. Payn, Esq., the Marshal of the
4 Southern District of New York.

II. That the only cause or pretence of your petitioner's confinement or restraint, according to the best of his knowledge and belief, is by virtue of a certain record of conviction in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, for a violation of the provisions of Section three thousand eight hundred and ninety-four (§ 3,894) of the Revised Statutes of the United States. That an exemplified copy of said record and of the whole thereof is
5 hereto attached and marked Exhibit A.

III. And your petitioner further states, that he is advised by his counsel, A. J. Dittenhoefer, Esq., and Louis F. Post, Esq., residing at the City of New York, in the District aforesaid, and verily believes, that his imprisonment is illegal, and that such illegality consists in this :—

1. That the Circuit Court of the United States has no jurisdiction to punish your petitioner for the acts charged in the indictment.

2. That the statute upon which said indict-
6 ment is drawn is unconstitutional and void.

3. That said Court was utterly without jurisdiction in the cause.

4. That the said Court exceeded its jurisdiction in committing your petitioner until the payment of the fine imposed.

IV. And your petitioner further shows, as the reason why this petition is made directly to this Court, that the questions sought to be raised thereon were brought before the Hon. Samuel Blatchford, then District Judge for the Southern District of New York (but now, or soon to be, Circuit Judge of the Second Circuit, having been nominated and confirmed to that position), upon Writs of Certiorari and Habeas Corpus, whereby your petitioner and the records of the committing magistrate in this cause were brought before said Judge, who decided the same questions here sought to be raised adversely to your petitioner, and discharged the writs. A copy of Judge Blatchford's opinion is hereto attached and marked Exhibit B. 7

Wherefore, your petitioner prays a writ of Habeas Corpus directed to Louis F. Payn, United States Marshal for the Southern District of New York, commanding him to have your petitioner before this Court on a day certain therein to be named, and a Writ of Certiorari directed to John I. Davenport, Clerk of the Circuit Court of the United States for the Southern District of New York, commanding him to have then and there the record of conviction herein filed in his office, and that this Court may inquire into the cause and legality of your petitioner's imprisonment or restraint. 8

Dated New York, March 18th, 1878.

A. O. JACKSON. 9

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

A. Orlando Jackson, being duly sworn, says:—that he has read the foregoing petition and knows

the contents thereof, and the same is true to his own knowledge.

A. O. JACKSON.

Sworn to before me, this 18th day of March, 1878,

JOHN A. SHIELDS,

10 [SEAL.] *U. S. Commis'r,*
S. D. of N. Y.

Exhibit A.

The President of the United States of America,
To all to whom these presents shall come, *greeting:*

Know ye, that we having inspected the records and files of the Circuit Court of the United States for the Southern District of New York, do find certain paper writings there, remaining of record, in the words and figures following, to wit:—

11

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Tuesday, the 8th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present—Hon. Judge BENEDICT, *Circuit Judge.*

The Grand Jury come into Court and present
12 the following bill of indictment:—

THE UNITED STATES
vs.
A. ORLANDO JACKSON.

For mailing prohibited matter.

CIRCUIT COURT

OF THE UNITED STATES OF AMERICA,

For the Southern District of New York in the Second Circuit.

At a Stated Term of the Circuit Court 13
of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the District and Circuit aforesaid, on the second Wednesday of March, in the year of our Lord, one thousand eight hundred and seventy-seven, and continued by adjournment to and including the 8th day of May, in the year of our Lord, one thousand eight hundred and seventy-seven. 14

Southern District of New York, *ss.* :

The jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath, present that,

A. ORLANDO JACKSON,

late of the City and County of New York, in the District and Circuit aforesaid, yeoman heretofore, to wit: on the 23d day of February, in the year of our Lord, one thousand eight hundred and seventy- 15
seven, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully and knowingly did deposit in the mail of the United States, and send to be conveyed by mail, a certain circular concerning a lottery offering prizes, which said circular was then and there

enclosed in an envelope, which said envelope was written as follows:

J. Ketcham,
Lock Drawer 164,
Gloversville,
N. Y.

16 against the peace of the United States and their dignity, and against the form of the Statute of the said United States, in such case made and provided.

SECOND COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that,

A. ORLANDO JACKSON,

late of the City and County of New York, in the District and Circuit aforesaid, yeoman heretofore,
17 to wit: on the twenty-third day of February, in the year of our Lord, one thousand eight hundred and seventy-seven, at the Southern District of New York, and within the jurisdiction of this Court, knowingly and unlawfully did deposit, and send to be conveyed by mail, a certain circular concerning an enterprise similar to a lottery and offering prizes, which said circular was then and there enclosed in an envelope, upon which said envelope was written as follows:

"J. Ketcham,
Lock Drawer 164,
18 Gloversville,
New York."

against the peace of the United States and their dignity, and against the form of the Statute of the said United States, in such case made and provided.

THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that,

A. ORLANDO JACKSON,

late of the City and County of New York, in the District and Circuit aforesaid, yeoman heretofore, to wit: on the third day of March, in the year of our Lord one thousand eight hundred and seventy-seven, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully and knowingly did deposit in the mail of the United States, and send to be conveyed by mail, a certain circular concerning lotteries offering prizes, which said circular was then and there enclosed in an envelope, was written as follows:

J. Ketcham,
Lock Drawer 164,
Gloversville,
N. Y.

against the peace of the United States and their dignity, and against the form of the Statute of the said United States, in such case made and provided.

FOURTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that,

A. ORLANDO JACKSON,

late of the City and County of New York, in the District and Circuit aforesaid, yeoman heretofore, to wit: on the third day of March, in the year of our Lord one thousand eight hundred and seventy-seven, at the Southern District of New York, and within the jurisdiction of this Court, knowingly and

unlawfully did deposit, and send to be conveyed by mail, a certain circular concerning an enterprise similar to a lottery and offering prizes, which was then and there enclosed in an envelope, upon which said envelope was written:

J. Ketcham,
Lock Drawer 164,
22 Gloversville,
N. Y.

against the peace of the United States and their dignity, and against the form of the Statute of the said United States, in such case made and provided.

STEWART L. WOODFORD,
United States Attorney.

At a Circuit Court of the United States, for the Second Circuit and Southern District of New York, begun on the
23 day of , in the year one thousand eight hundred and seventy- , and continued, by adjournment, to and including the day of , in the year one thousand eight hundred and seventy- , and on the day last aforesaid, at the City of New York, in the District and Circuit aforesaid.

Present—The Hon. CHAS. L. BENEDICT, *Judge.*

24

THE UNITED STATES

against

A bill of indictment having been presented against

the said defendant by the grand jurors of the said District, in manner and form herein before set forth, and the said cause having been duly tried by a jury at a Circuit Court of the United States for the District and Circuit aforesaid, begun on the day of , in the year one thousand eight hundred and seventy- ; and the jury aforesaid having found therein, a verdict of "Guilty," and the defendant having been heretofore remanded to await the sentence of the Court, Now, on motion of George Bliss, Esq., United States Attorney for the Southern District of New York, the defendant being here present in Court. It is ordered that the said defendant be imprisoned in for the term of , and that he pay a fine of dollars.

And it is further ordered that the fine aforesaid be forthwith docketed as a judgment of this Court.

25

26

U. S. CIRCUIT COURT.

THE UNITED STATES OF AMERICA

vs.

A. ORLANDO JACKSON.

Indictment mailing prohibited matter.

U. S. Rev. St., § 3,894.

27

STEWART L. WOODFORD,
U. S. District Attorney.

A true bill.

JOHN H. UHL,
Foreman.

U. S. Circuit Court.

Filed May 8th, 1877.

JOHN I. DAVENPORT,
Clerk.

Filed in open Court.

June 21, 1877, the defendant arranged and indict read. Defendant plead not guilty, by order of Court.

28 18 , the defendant called on.

Recognizance and appearing same.

June 21, 1877, the defendant called.

Verdict—Guilty.

March 18, 1878—Sentence.

One hundred dollars ($100) fine and the costs of the prosecution, and to stand committed to the County jail of this County, until said fine and costs are paid.

At a Stated Term of the Circuit Court of the United States of America, for the
29 Southern District of New York, in the Second Circuit, held in the United States Court Rooms, in the City of New York, on Thursday, the 21st day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Present—The Honorable *Judge* BENEDICT,
Circuit Judge.

30 THE UNITED STATES

vs.

A. ORLANDO JACKSON.

On motion of the U. S. District Attorney.
Ordered arraignment.

The defendant on being arraigned, refused to plead, and a plea of not guilty is entered by order of the Court, which order is objected to by A. J. Dittenhoefer, Esq., defendant's attorney.

On motion of the U. S. Distict Attorney, Ordered trial.

31

Jurors Sworn.

Chas. S. Fellows,	Chas. H. Deluge,
Geo. C. Fisher,	Wm. B. Rogers,
Thos. Norton,	James R. Floyd,
John B Lee,	Elias Moore,
Robert Madan,	Laurent A. Jacquelin,
Hugh Masterson,	Henry G. Fisk.

Benj. B. Foster, Esq., opens the cause on part of prosecution.

32

Evidence for prosecution.

Anthony Comstock, sworn.

Letter and slip from newspaper, marked Ex. A.

Without summing up on either side, charge is given by the Court to the jury, who, without leaving their seats, say that they find the defendant guilty, and so they say all.

33

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Monday, the 18th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

34

Present—The Honorable *Judge* BENEDICT,
Circuit Judge.

UNITED STATES

vs.

A. ORLANDO JACKSON.

35

On motion of the U. S. Dist. Att'y, ordered sentence:

The Court thereupon proceeds to pass judgment and sentence the defendant, A. Orlando Jackson, to pay a fine of one hundred dollars, ($100.00,) and the costs of the prosecution, and to stand committed to the county jail of this county, until said fine and costs are paid.

36 All of which we have caused by these presents to be exemplified, and the seal of the said Circuit Court to be hereunto affixed.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the City of New York, in the Southern District

of New York, this nineteenth day of March, in the year of Our Lord one thousand eight hundred and seventy-eight, and of Our Independence, the one hundred and second.

SEAL. JOHN I. DAVENPORT, *Clerk.*

37

I, SAMUEL BLATCHFORD, Judge of the said Circuit Court do hereby certify, that the foregoing exemplification is in due form of law.

N. Y. SAM'L BLATCHFORD.

Exhibit B.

U. S. CIRCUIT COURT.

In the matter of
A. ORLANDO JACKSON,
On Habeas Corpus.

38

BLATCHFORD, *J.*

On the 8th of March, 1877, a United States Commissioner for this District, issued a warrant to the Marshal which recited that complaint on oath had been made to him, charging that A. Orlando Jackson did, on and about the 23rd of February, 1877, at the Southern District of New York, unlawfully, wilfully and knowingly deposit, and cause to be deposited in the Post Office and Mails of the United States, then and there for mailing and delivering certain circulars, lotteries, and commanded him to 39
apprehend said Jackson. Jackson was arrested under this warrant and brought before the Commissioner on the 13th of March, and was identified as the party charged, and discharged on bail to await trial. Subsequently he was surrendered by his surety, and he demanded an examination before the Commissioner on the charge, and it was had, and the Commissioner on the 2nd of May, decided that there

was probable cause to believe that Jackson committed the offence charged, and he committed him to the custody of the Marshal to await the action of the Grand Jury, in default of $500 bail.

Thereupon, he has been brought before this Court on a writ of *Habeas Corpus*, issued to enquire into the cause of his imprisonment and the proceedings
40 which took place before the Commissioner had been brought before this Court by a writ of *certiorari*. It appeared before the Commissioner that Jackson, on the 23rd of February, 1877, deposited in the Post Office at New York City, to be conveyed by mail, a sealed letter envelope, addressed as follows:

"J. Ketcham,
Lock Drawer 164,
Gloversville, N. Y."

And which contained circulars concerning a lottery described as "The Kentucky State Lottery, Sim-
41 mons and Dickinson, Managers," and also circulars concerning Louisiana and Havana Lotteries, the postage on which was duly prepaid by stamps, and that the above named lotteries were authorized by the laws of the respective States of Louisiana, Kentucky, and the Kingdom of Spain.

The prosecution in this case is founded on § 3,894 of the Revised Statutes, which as amended by § 2 of the Act of July 12th, 1876, (19 *U. S. Stat. at Large*, 90,) provides that no letter or circular concerning lotteries, so-called gift-concerts, or other similar enterprises, offering prizes or concerning schemes
42 devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mails; and that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this Section, shall be punishable of a fine of not more than five hundred dollars and not less than one hundred dollars, with costs of prosecution."

The amendment of 1876, consisted in stiking out the word "illegal" before the word "lotteries," from the Section as originally enacted in the Revised Statutes. A part of the Statutory provisions embodied in § 3,894 of the Revised Statutes was originally enacted July 27th, 1868, as § 13 of the Act of that date, (15 *U. S. Stat. at Large*, 196,) in these words: "It shall not be lawful to deposit in a post office, to be sent by mail, any letter or circulars concerning lotteries, so-called gift-concerts, or other similar enterprises offering prizes of any kind, on any pretext whatever." no specific penalty or punishment was imposed for a violation of this provision. On the 8th of June, 1872, it was enacted as follows—by § 179 of the Act of that date, (17 *U. S. Stat. at Large*, 302:) It shall not be lawful to convey by mail, nor to deposit in a post office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction in any Federal Court, of the violation of this Section." It is to be noted that the word *illegal* was not in the Act of 1868, but was inserted in the Act of 1872, and continued in the Revised Statutes, and stricken out by the Act of 1876.

Congress has at various times exercised the power of excluding from the mail various articles, capable of being conveyed in sealed letter envelopes, and of declaring it to be a punishable offence to deposit such articles in the mail. By § 148 of the Act of June 8th, 1872, (17 U. S. Stat. at Large, 302), it was enacted that no obscene book, pam-

phlet, picture, print, or other publication of a vulgar or indecent character, shall be carried in the mail, and that any person who shall knowingly deposit for mail or for delivery any such obscene publication, shall be deemed guilty of a misdemeanor, and, on conviction thereof shall, for every such offence, be fined not more than $500 or im-
46 prisoned not more than one year, or both, according to the circumstances and aggravation of the offence.

By § 2 of the Act of March 3rd, 1873, (17 U. S. Statute at Large, 599), such inhibition was extended to every "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," and to every "article or thing designed or intended for the prevention or procuring of abortion," and to "every article or thing intended or adapted for any indecent or immoral use or nature;" and to every "written or
47 printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, when, or how, or of whom, or by what means either of the things before mentioned may be obtained or made," and it was enacted that any person who shall knowingly deposit, or cause to be deposited, for mail or delivery, any of said articles or things, or any notice or paper, containing any advertisement relating to said articles or things, and any person who in pursuance of any plan or scheme for dis posing of any of said articles or things, shall take,
48 or cause to be taken from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall for every offence, be fined not less than $100 nor more than $500, or imprisoned at hard labor not less than one year nor more than ten years, or both, in the discretion of the Judge. These provisions were reenacted in § 3,893 of the Revised Statutes, and by

Section 1 of the Act of July 12th, 1876. (19 U. S. *Stat. at Large*, 90.)

It is contended for the relator that if §3,894 can be construed to cover sealed letters, it is void as not within any power conferred on Congress by the Constitution. The argument is that prior to the adoption of the Constitution, which conferred on Congress, (*Act* 1 *Sec.* 8), the power to establish Post Offices, and Post Roads," the States and the people had enjoyed for many years the right of having conveyed by post all sealed letters, without reference to their contents, unless such contents were liable to destroy, deface or otherwise injure the contents of the mail bag, or the persons of those engaged in the postal service, such as liquids, poisons, glass or explosive materials; and that such grant of power must be construed as not authorizing Congress to exclude from the mail what was legitimate mail matter at the time of the adoption of the Constitution. It is further said that Congress is bound to provide for carrying by mail everything which it prohibits from being carried otherwise than by mail; and that it has made it a punishable offence to carry letters for hire outside of the mail. It is further said, that the exercise of a power absolutely to prohibit the carrying in the mail of sealed letters containing information of a certain character, is not the exercise of a power which is either proper or necessary for carrying into execution, the power of establishing post offices and post roads; that a power of exclusion, based upon the contents of sealed letters, is an arbitrary power, and may be extended to the exclusion of matters which depend on caprice or whim; and that the exclusion in the present case, extends to matters which are lawful under the laws of some of the States of Union, and to matters over which the Federal Government has no jurisdiction.

On the part of the United States it is contended, that it is within the constitutional power of Congress to determine, what shall be mail matter; and that in pursuance of such power, it may lawfully exclude certain articles and things from the mail, although such articles and things are contained in sealed envelopes, and may declare it to be
52 an offence to deposit such articles and things in the mail.

The meaning of the clause in the Constitution, (Act 2 Sec. 8), that Congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers," has been settled by judicial construction. It does not mean that no law is authorized which if not indispensably necessary to give effect to a specified power Congress possesses the choice of means, and is empowered to use any means which are
53 in fact conducive to the exercise of a power granted by the Constitution. (United States *vs.* Fisher, 2 *Cranch*, 358, 396. The necessity spoken of in the clause is not to be understood as an absolute one, but Congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into exection, which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people.

If the end is legitimate and within the scope of the Constitution. then all means which are appro-
54 priate, and are plainly adapted to that end, and are not prohibited but consist with the letter and the spirit of the Constitution, are constitutional; and if a particular law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, an enquiry by a Court into the degree of its necessity would be to pass the

line which circumscribes the judicial department and to tread on legislative ground.

McCulloch v. State of Maryland, 4 *Wheaton*, 421, 423; Legal Tender Cases, 12 *Wallace*, 539.

The principal argument on the part of the relator is, that inasmuch as the exclusive power is given to 55
Congress to establish post offices and post roads, it is not authorized to refuse to carry in the mail anything which was lawful mail *matter* at the time the Constitution was adopted. This line of reasoning has been sought to be applied to other matters of Federal cognizance, but has not met with favor. Thus Congress is authorized to establish uniform laws on the subject of bankruptcies throughout the United States; and it has been contended, in respect to laws on that subject which have been enacted by Congress, that the power of Congress is limited to 56
the principal on which the English bankruptcy system was founded when the Constitution was adopted, and cannot extend to authorizing voluntary bankruptcies, or to putting into bankruptcy others than traders, or to granting discharges without the consent of creditors, or to authorizing such compositions as are now provided for. But the view has prevailed that Congress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the Constitution was adopted, and that it is sufficient if the statute relates to the subject of 57
bankruptcies.

In re Klien, 1 *Howard*, 278; *In re* Silverman, 1 *Sawyer* 410; United States v. Pusey, 6 *Nat. Bkcy. Reg.*, 284; *In re* Remran, 7 *Benedict*, 455; and 12 *Blatchf. C. C. R.*, 562.

So also in respect to admiralty and maritime jurisdiction. The Constitution declared (*Art.* 3. *Sec.* 2,) that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Prior to the decision in the case of the *Propeller Genesee Chief* v. *Fitzhugh*, 12 *Howard*, 443, it had always been understood and held that, 58 under the Constitution such jurisdiction was confined to tide waters. In that case it was held that according to the true construction of the grant in the Constitution, the admiralty jurisdiction extended to all public navigable waters, whether influenced by the tide or not. In England, in the text books, and the decisions the jurisdiction of the admiralty had always been spoken of as confined to tide water, tide water and navigible water being in England synonymous terms, and "tide water" meaning in England nothing more than public rivers contradistinguished from private ones. At the time the 59 Constitution was adopted and our Courts of Admiralty went into operation, the English definition of of the jurisdiction, that it was confined to the ebb and flow of the tide, was adopted here by the Courts.

But it afterwards became evident that a definition which would limit public rivers in this country to tide water rivers was utterly inadmissible, and it was held that the lakes and the waters connecting them were public waters and within the grant of admiralty and maritime jurisdiction in the Constitution.

60 These illustrations serve to show that in construing a grant of power in the Constitution, it is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the Constitution was adopted. A power to establish post offices and post roads is executed by the single act of making the establishment; but

under such power it has always been held to be lawful to carry the mail along the post roads from one post office to another, and to punish those who steal letters from the post office or rob the mail. So, under the power to establish post offices and post roads, it must be held that Congress has the right to prescribe what it will carry along the post road as part of the mail, and what it will not carry, and to render its enactments efficient by punishing as an offence the violation of them. 61

Whether certain things shall be excluded or not, is a matter for the sound discretion of Congress, and the discretion of a Court cannot be substituted for the discretion of Congress. The discretion of Congress cannot be fettered by the consideration that a given thing was generally or even universally allowed to be carried in the mail when the Constitution was adopted. To argue against the existence of such discretion, because it is possible for Congress to abuse its exercise by excluding from the mail letters containing matter of a given character, through caprice or from partisan prejudice, is to argue against the existence of all discretion in Congress in the exercise of any of the powers conferred on it. All such discretion may be abused, but the correction of the abuse must be left, under our form of government, to the expression of the will of the people, by means of the elective franchise. The existence of the abuse is no argument against the existence of the power. Because an individual judge might not, if a legislator have thought it wise, to exclude from the mail a sealed letter containing matter of a given character, it is not for him, in the exercise of his judicial functions, to hold that such exclusion is not within the Constitutional authority of Congress. 62 63

Whether the provisions of law which forbid and punish the carrying of letters outside of the mail

will be construed as applying to letters which Congress forbids to be carried in the mail, is a question which does not arise in this case.

It is undoubtedly not indispensably necessary to the exercise of the power of establishing post-offices and post roads, that letters or circulars concerning lotteries, should be excluded from the mails. But
64 Congress is not prohibited from excluding them, and if Congress regards it as most beneficial to the people, and as calculated to effect in the most proper manner the objects of establishing post-offices and of carrying the mail, to exclude from the mails letters concerning lotteries, whether legal ones or illegal ones, it is for Congress, and not for a Court, to judge of the degree of the necessity for such exclusion.

It is also contended for the relator, that §3,894 of the Revised Statutes does not create any crime or offence against the United States. This is not so.
65 The word "punishable," and the fact that the amount of the fine imposed is discretionary, indicate that a crime is intended, and not a pecuniary penalty to be recovered by a civil action.

It is further urged that because the only punishment is a fine, and there can be no imprisonment except for the non-payment of the fine, the relator cannot be arrested and deprived of his liberty in the first instance. But §1,014 of the Revised Statutes provides, that for any crime or offence against the United States, the offender may be arrested and imprisoned or bailed for trial. If there be a crime or
66 offence, an arrest for trial may be made, to be followed by imprisonment, if no bail is taken, or by bail, even though the punishment on conviction be a fine alone. The arrest is made to secure a trial for the offence.

The writ is dismissed and the relator is remanded

to the custody of the Marshal under the process of commitment by which he was held.

ABRAM J. DITTENHOEFER,
for the Relator.

BENJAMIN B. FOSTER, 67
Assistant District Attorney,
for the United States.

(Endorsed.)

U. S. CIRCUIT COURT.

In the matter of
A. ORLANDO JACKSON
On Habeas Corpus. 68

Decision June 9, 1877.

U. S. CIRCUIT COURT.

Filed June 9, 1877.

JOHN I. DAVENPORT,
Clerk. 69

(Endorsed.)

SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

70 *In the matter of the Petition of*

A. ORLANDO JACKSON

For writs of Habeas Corpus and Certiorari.

Petition and order to show cause.

Filed 26th March, 1878.

I, D. W. Middleton, Clerk of the Supreme Court of the United States, do hereby certify that the fore-
71 going manuscript, pages numbered from 1 to 46 inclusive, contain true copies of the petition and Exhibits, and rule to show cause issued thereon, in the case entitled *Ex parte:* In the matter of A. Orlando Jackson, Petitioner, No. 6, original, as the same remain on the files and records of said Supreme Court.

In testimony whereof I have hereunto subscribed my name and affixed the
[SEAL.] seal of said Supreme Court, at the City of Washington, this 4th day of April,
72 A. D. 1878.

D. W. MIDDLETON,
Clerk,
Supreme Court U. S.

No. 6, ORIGINAL.—OCTOBER TERM, 1877.

U. S. Supreme Court.

Ex Parte in
THE MATTER
OF
A. ORLANDO JACKSON.

Petition for Writs of Habeas Corpus and Certiorari.

ARGUMENT FOR PETITIONER.

A. J. DITTENHOEFER.
(Tribune Building, New York,)

LOUIS F. POST,
(59 Liberty St., New York.)

Counsel for Petitioner.

New York:
HENNESSY & CO., PRINTERS, OFFICE, 34 PARK ROW, N. Y.
1878.

No. 6—Original. October Term, 1877.

Supreme Court

OF THE UNITED STATES.

1

Ex parte in the Matter of A. Orlando Jackson.	Petition for Writs of Habeas Corpus and Certiorari.

2

ARGUMENT FOR THE PETITIONER.

Statement of Facts.

The Petitioner was arrested by virtue of a magistrate's warrant, charging him with a violation of the provisions of §3,894 of the Revised Statutes. Appearing in custody before John A. Shields, Esq., a United States Commissioner for the Southern District of New York, he was examined pursuant to the usual practice, and duly committed for trial.

3

By writs of *habeas corpus* and *certiorari* the Petitioner and the Commissioner's record were thereupon brought before the Circuit Court of the United States for the Southern District of New York, and formal argument had upon the question of the constitutionality of section 3,894, upon which the com

mitment was based. The opinion of the Court dismissing the writs and remanding the Petitioner was delivered by the Honorable Samuel Blatchford, and is attached to the petition now before this Court.

See Printed Record, page 13, *et seq.*

4 The Grand Jury then presented to the same Circuit Court an indictment charging the Petitioner with a violation of section 3,894 of the Revised Statutes by having knowingly deposited in the mail of the United States to be conveyed by mail a letter concerning a certain lottery offering prizes.

To this indictment the Petitioner was called upon to plead, and standing mute, a plea of not guilty was entered by the Court by authority of section 1,032 of the Revised Statutes; he was subsequently brought to trial and a verdict of guilty
5 found and recorded.

On the 18th day of March, 1878, the Petitioner was brought to the bar of the same Circuit Court for sentence, and was condemned to pay a fine and committed until the payment thereof.

He now brings his petition to this Court and prays the issue of a writ of *habeas corpus* to the Marshal, and a writ of *certiorari* to the Clerk of the Circuit Court commanding him to produce the record in the cause. Accompanying his petition is an exemplified copy of the record, and upon the petition and
6 record a rule to show cause why the writs should not issue has been granted. As the record is as fully and completely before the Court (for the purpose of argument) as it could be if brought pursuant to a writ, the matter is practically in the same position as was the case of Lange, where both writs were allowed upon an understanding that the writ of *habeas corpus* should not be issued or executed

until a return of the writ of *certiorari* and a hearing thereupon.

See *Ex parte* Lange, 18 Wall., 163, (dissenting opinion of Clifford, J., p. 182.)

It is therefore suggested that this petition be disposed of upon the merits at the hearing on the return of the rule. 7

The statute upon which the indictment is drawn (R. S., § 3,894,) is as follows:

> "No letter or circular concerning [illegal*] lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution." 8

Jurisdiction of the Supreme Court.

The record shows that the Petitioner is guilty of a violation of the provisions of this statute, and subject to the penalty it imposes, if the statute is a valid one. But he urges that the statute is void, as unconstitutional, and that therefore the Circuit Court never acquired jurisdiction to punish him in any manner whatever, and has no power to enforce a penalty. The Circuit Court having acted without jurisdiction, and the prisoner being restrained of his liberty in consequence, this Court is empowered to relieve by the writs prayed. 9

Ex parte Lange, *id.*, 165, and cases cited.
(See especially dissenting opinion of Clifford, *J.*, at pp. 182–3–4.)

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* Struck out by A. C., July 12, 1876, Ch. 186, 22.

The Issue.

Our proposition broadly stated is, that Congress has no power to prohibit the transmission of intelligence, public or private, through the mails; and any statute which distinguishes mailable from unmailable matter merely by the nature
10 of the intelligence offered for transmission, is an unconstitutional enactment.*

If this proposition is correct in substance, the writs should issue and the Petitioner be discharged.

General Powers of Congress Respecting the Mails.

The Congress are empowered by Article I, §8, Subd. 7, of the Constitution, "to establish post offices and
11 post roads," and from this provision they acquire either expressly or by implication, their entire and *only* authority to legislate upon the subject of mail transportation.

The *express* power conferred is the power to establish routes over which the mail shall be carried, and points or places for reception and delivery. From this express power, the power to receive, to carry and to deliver the mail are *implied*, and out of these emanate other *incidental* powers, one of them being the right to protect the
12 mail by appropriate legislation.

See McCullough *v.* Maryland, 4 Wheat., 316, 417.
Sturtevant *v.* City of Alton, 3 McL., 395.

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* The power to prohibit and interfere with *treasonable* correspondence, finds justification in the right of self-perservation—an inherent right of governments as of men,—and not in the constitutional provision from which Congress derive such authority as they possess over the Federal mails. It is a power which the Government may exercise without regard to the channel through which the correspondence passes.

But all *implied* rights or powers are, and must be, mere *means* or *aids* to the accomplishment of, or to make effectual, the power expressed.* Any laws which are appropriate *measures* for the establishment of a post office or post road, or for receiving, protecting, carrying or delivering the mail, and which are plainly adapted to the purpose, and consistent with the letter and spirit of the Constitution, (and such laws only), are within the power of Congress to adopt. This proposition is not only based upon principle, but is sustained by a provision of the Constitution itself. 13

McCullough *v.* Maryland, 4 Wheat., 406 to 421.

The Power of Congress Exclusive.

And any legislation establishing a post office or post road, or appropriately adapted to the accomplishment of either purpose, or the purpose of receiving, protecting, carrying, or delivering the mail, is within the sphere of Congressional action, consequently, to this extent, the Federal Government is supreme. 14

To quote the language of Chief Justice Marshal, in McCullough *v.* Maryland, at page 405: "If any proposition could command the universal assent of mankind, we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. 15

* The right to carry the mail, though not an apropriate *means* or *aid* to the *accomplishment* of the express power, is, nevertheless, an appropriate—indeed, a necessary—*means* of making the express power *effectual*. The framers of the Constitution intended that post roads and post offices should be *used* as well as established, and unless Congress have power to use them they may be entirely neglected.

lege sought. (2.) That by the fair and reasonable import of the terms of that provision of the Constitution which confers upon Congress the power to establish post-offices and post-roads, (and by which it was also intended to confer the power to use the offices and roads established and to make both powers exclusive), it appears that the people did
22 intend to obtain a privilege. (3.) That the privilege they intended to obtain was a speedy, regular and uninterrupted transportation of *mail matter*. (4.) That the meaning of *mail matter*, the subject of this privilege which the people intended to obtain, is *intelligence contained in letters and packets;* and, therefore, (5.) That the postal power conferred upon Congress by the Constitution, when exercised, carries with it the duty of speedily, regularly and uninterruptedly transporting intelligence contained in letters and packets.

23 To intelligently discuss the views advanced will first require an examination into the history of the postal service.

We may reasonably infer that the postal service, as a public institution, grew out of the use of couriers for private purposes, and on special occasions. Little doubt can exist that the habit of communicating intelligence in written symbols, by the agency of messengers, must have originated and spread with the invention, growth and perfection of writing. We find couriers in use for the purpose of convey-
24 ing dispatches at the earliest periods in history, but their services were confined to an employer, and their journeys were made as required, and not at regular intervals. Then came established routes and posts, and messengers who made journeys at stated periods; and while this organization was for the exclusive use and benefit of the sovereign power

in the transmission of orders and intelligence to and from distant provinces, it was nevertheless a system for regularly conveying written intelligence, and may be regarded as the real root from which has grown our present postal service; for,as these couriers made stated journeys at stated times, it was but a step in advance to permit the people to enjoy their services as well as the Government. 25

In the heighth of her glory, and while England was her province, we find Rome maintaining a regular system of posts, upon royal ways radiating from the Eternal City to and through all the countries subject to her power, over which couriers carried *private* as well as public letters; and all the people of Rome and her dependencies enjoyed the benefits of a public postal service. As the great Commonwealth declined, the posts were gradually abandoned and the ways neglected and deserted. At various times after the Dark Ages, spasmodic efforts were made 26 on the Continent of Europe looking to an imperfect restoration of the system Rome had established. Among these attempts we find the posts of the Counts' of Thurn and Taxis, which were maintained for many generations; those of Charlemagne, which were abandoned at his death, but revived in France by Louis XI.; and the system of the University of Paris, which employed messengers at the expense of the University. The object of all, was the speedy and regular conveyance of intelligence contained in letters.

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In England the postal service may be said to date back to 1516, when Sir Brian Tuke was Master of the Posts. His successors were Sir William Paget and John Mason, whose patent is dated November 12, 1545, and grants to them during their lives and the life of the survivor, the office of Master of the

messengers, runners or posts, as well within the Kingdom of England as in parts beyond the seas in the King's dominions. The same rights were afterward granted by letters patent from time to time to different persons, and in 1590 such letters were issued by Queen Elizabeth to John Stanhope. In 1619, James I., by letters patent, appointed Mathew
28 de Quester Postmaster of England for foreign parts out of the King's Dominion. This gave rise to litigation between Stanhope and de Quester, which was finally terminated by Stanhope's surrender of his patent. De Quester's patent subsequently came into possession of Thomas Witherings, who suggested to the Crown a plan for the entire re-organization of the inland posts, by establishing fixed rates of postage; substituting horse posts, which were to travel at the rate of 120 miles in 24 hours, instead of foot posts, which traveled at the rate of 18 miles; and *giving to the public generally the use of the*
29 *post-office.* The plan was adopted and Witherings appointed to the office; this was about 1635–7. About 1640, Phillip Burlamachi, a merchant of London, succeeded Witherings. Afterwards, in 1644, came Edmund Prideaux, a member of the House of Commons. He held the office until 1653, when it was farmed out; and in 1655 Lord Thurloe was appointed. In 1657 an act of Parliament was passed establishing a postal service in England, Scotland and Ireland. This was under the Protector, and after the restoration Charles II., by indenture, dated September 1, 1630, agreed to farm to Henry
30 Bishopp for the term of seven years, all powers and profits expressed in the "pretended" act of 1657, for an annual rent. On the 12th of September, 1660, Parliament confirmed this agreement until the 6th of November ensuing, and in December, 1660, passed an act almost identical with that of 1657. Then came a proclamation quieting Bishopp in the exe-

cution of his office. On his surrender in 1663 it was granted to Daniel O'Neale, who farmed it for the remainder of Bishopp's term.

The object of these letters patent and parliamentary acts was to provide a speedy and regular conveyance of intelligence contained in letters. 31

See Article of Gardiner G. Hubbard, in Johnson's Universal Cyclopædia, tit. "Post Office."
1 Morgan's Law of Literature, § 207.
Report of the Secret Committee of the Post-office in Parliament, dated Aug. 5, 1844, published in Rivington's Annual Register for 1844, page 440.

Prior to 1685 the postal revenues of England had been settled upon the Duke of York, to sustain the dignity of his title (2 Brodhead's Hist. of N. Y.), and the right to carry *letters* and *packets* in the British Colonies was occasionally farmed out—one-tenth of the revenue being reserved to the Duke. 32

3 Col. Doc., (N. Y.,) 349.

About the same time, the first definite proposition for the establishment of a public postal service in the colonies was suggested. The suggestion was made by Governor Lovelace of New York, who proposed to have sworn messengers carry *letters* and small *packets* between New York and Boston, for the convenience of the inhabitants. 33

2 Brodhead's Hist. of N. Y., 196–7.

Owing to the Dutch war and other causes, the plan of Governor Lovelace did not go into successful operation, but the suggestion was revived by Governor Dongan of the same Colony in 1685. He proposed to set up post houses along the coast

from Carolina to Nova Scotia, and *for the better correspondence between the Colonies of America*, he ordained in council the establishment of a post-office, and fixed rates of postage.

Id. 413.

When the Duke of York ascended the throne,
34 the postal revenues theretofore settled upon him, vested in the crown, and in the same year that Governor Dongan's ordinance was adopted in New York, (1685,) Edward Randolph was appointed deputy post-master of New England by Lord Treasurer Rochester, (2 Brod. Hist. of N. Y., 4, 434,) and two years after, in 1687, the same Lord Treasurer appointed William Bogardus, to be post-master for the province of New York.

Id. 406.

Between the years 1689 and 1692, Thomas Neale
35 obtained a patent to establish post-offices throughout the American Colonies, and on the 4th of April, 1692, he appointed Andrew Hamilton (Governor of New Jersey,) his deputy for all the plantations. Governor Hamilton brought the subject before Governor Fletcher and the New York Legislature, and an act to encourage a post-office was immediately passed by them.

4 Col. Doc,. (N. Y.,) 200.

Similar laws were passed in Virginia, Massachusetts and other colonies, and a colonial post-office
36 system, though of a very limited and imperfect character, was established and continued under Neale's patent.

2 Hildreth's Hist. of U. S., 182.

And the object of all these efforts was to provide for the speedy and regular transmission of intelligence contained in letters and packets.

We discover no further data respecting the postal service in America until 1710; but prior to that year a system had been established in England and Scotland under the act of Parliament of 1660. In 1710, Neal's patent having expired, (2 Hildreth's Hist. of U. S., 262,) Parliament passed a general law repealing all previous enactments, and providing for a 37
general post-office for and throughout Great Britian and Ireland, the colonies and plantations, viz: North America and the West Indies, and all of her majesty's dominions and territories. The system therein provided for, was to go into operation on the first of June, 1711. There was to be one general letter office in some convenient place in London from whence ALL LETTERS AND PACKETS WHATSOEVER might be sent into any part of the Kingdom of Great Britian and Ireland, North America, the West Indies, any other of her majesty's dominions or territories, and to any kingdom or country be- 38
yond sea; and at this office all returns and answers were to be likewise received. The Queen was to appoint from time to time a post-master general, who was to appoint deputies, and *no other persons* were to be permitted to carry *letters and packets*, except such as concerned goods taken by common carriers; such letters were to be permitted to accompany the goods. A chief letter office was to be erected by the post-master general at Edinburgh, Dublin and *New York*, and one in *each American colony*, and in each West India Island; and he was to appoint deputies to manage them. 39

4 St. at Large (British,) Ed. of 1769, p. 434.

The object of this statute was to provide for the transmission of letters and packets; and that the letters and packets intended were such as contained *intelligence* as distinguished from *chattels*, seems

obvious, not alone from the history of the subject, but as well from the provision which disclaims exclusive rights as to letters accompanying goods.

Under this law a "line of posts was presently established on Neal's old routes, north to the Piscataqua and South to Philadelphia, irregularly extended a few years after. to Williamsburg, in Virginia, the post leaving Philadelphia for the South as often as letters enough were lodged to pay the expense."

2 Hildreth's Hist. of U. S., 263.

The colonial postal system thus established was maintained until after the out break of the Revolutionary war, and during the administration of Benjamin Franklin as deputy post-master general under the act of Parliament, great improvements were made in the regularity and speed of transmitting letters and packets through the post to distant points.

When the rupture between the colonies and the home government had ripened into a general war, the people here were necessarily deprived of the convenience and advantage of the British postal service, and at the second session of the Continental Congress—the first after the breaking out of hostilities—a general post office was organized by the appointment of Dr. Franklin as post-master general of the United Colonies. The powers and instructions given him were, to hold his office at Philadelphia, to appoint deputies, and to establish a line of posts from Falmouth, Mass., to Savannah, Georgia, with such cross posts as he should judge proper.

Journals of Cont. Cong. Vol. 1, p. 165, July 26, 1775.

This was the first step by the American people, as a people, to secure to themselves the benefits—which even then had become a necesity—of a general, public, and regular mail service.

But this act of the Continental Congress was only the adoption of a *means* whereby the long established postal service might be continued under 43
Continental authority, *as it had existed under the British statute.* When Dr. Franklin was appointed by the British Postmaster General, he was appointed only for the purpose of executing in the Colonies those provisions of the Statute which imposed the duty of receiving, transporting and delivering *all letters and packets whatsoever.* The object of his appointment by the Continental Congress must have been the same, unaccompanied as it was by any detailed instruction or express authority. These provisions of the English statute were in effect, so
far as applicable, re-enacted by the Continental 44
Congress, and became the guide of the Continental Postmaster General. The system established by Franklin under this authority, continued until 1781, when by the articles of Confederation, (Art. 9,) Congress was invested with the sole and exclusive right to establish and regulate post offices from one State to another, and to exact postage to defray the expenses.

It will be observed that the purpose of the post from its inception had been *the transmission* of
intelligence, and the intelligence so transmitted was 45
contained in *letters* and *packets.*

This was the history of the postal service at the adoption of the constitution, and this the knowledge and experience upon which the American people are presumed to have acted when they delegated to the Federal Congress the power "to establish post offices and post roads."

To slightly paraphrase the language of Judge Story, (2 Story on Const., [Bennett's ed.,] § 1125,) the post office establishment had even then become a beneficent and useful establishment; it already circulated intelligence of a commercial, political, intellectual and private nature with speed and regularity, and administered in no inconsiderable degree
46 to the comfort, the interest, and the necessities of persons in every rank and station of life; and it was to the people of the country not merely a valuable, but a *necessary* and *indispensible* institution, which they desired and intended to preserve to themselves and their posterity.

To leave the transportation of their mails to the legislatures of their respective States would have resulted, as was readily foreseen, in serious inconvenience. The end sought "was the prompt, punctual and certain distribution of intelligence without
47 any of the inconveniences, obstructions or delays that might be apprehended from discordant and inefficient State regulations, or from any necessary dependence on State authority or State will, (Dickey *ex.* Turnpike Co., 7 Dana (Ky.), 133; and the proposed general government presented itself as the most efficient agent to accomplish this end. At the same time, to give to Congress complete and arbitrary power over the entire subject of the postal privilege, would have been to repose in Congress a discretion which they might carelessly or maliciously exercise to the prejudice of individuals, or localities, or even of
48 the people at large. The British government (see reports of the Secret Committees of the Post-office in Parliament, published in Rivington's Annual Register for 1844, pages 440, 463) and other sovereignties had exercised an espionage over the mail, principally, however, for the purpose of procuring in-

formation about and evidence against criminals and suspected persons generally, and had intercepted, broken open and examined posted letters, and otherwise interferred with a free and uninterrupted transmission of mail matter. This power, though it lawfully existed, was so liable to abuse, so completely at war with the sentiments of the American people, and withal a power in which the probable 49
evils so greatly outweighed the possible benefits, that we can readily understand why the people in forming a new government and establishing in connection therewith a new postal service, should desire to bury it beyond any reasonable possibility of resurrection. If such was not their purpose, why were they so cautious in this provision of the Constitution? Why did they not broadly entrust the entire subject to the jurisdiction of Congress, as they did in respect to foreign and inter-state commerce, naturalization, bankruptcy, coinage, weights 50
and measures, patents, copyrights, piracies, and offences against the law of nations? A complete jurisdiction over all these subjects we find conferred in the most unguarded terms, except that naturalization and bankruptcy laws are required to be uniform and patents and copyrights to be limited in duration; while the postal power can by no possible stretch of language be made to include more than the right to provide *ways and means* for the conveyance of the mail, and any greater power than this over the subject is reserved to the people, (Tenth Amendment.) Is it not then a most fair and 51
reasonable inference that it was the intent of the people, by the use of such guarded terms in conferring the grant, to withhold from Congress that portion of sovereign power over the post which authorized espionage of the mail, interception and violation of its contents, and the right to fix a defi-

nation (arbitrary or otherwise) of mail matter; and to limit the power of Congress to the establishment and use of ways and means for transporting that mail matter which had at the adoption of the Constitution been defined by long usage and law to be *intelligence contained in letters and packets.* *

52 We submit, then, that the people intended to give Congress supreme control over the *methods* of receipt, transportation, protection, and delivery of the mail, but to withhold all right to make unmailable whatever was then understood to be mailable matter. *All intelligence contained in letters and packets* was then understood to be mailable matter. And it would be as much within the power of Congress to prohibit express companies from carrying merchandise within the bulk or weight now carried in the mails, as to refuse to carry letters containing information or intelligence of a certain
53 character. In the first case, Congress would exceed its power, not because it has not the exclusive right to transport the *mail*, but because merchandise was not legitimate mail matter at the adoption of the Constitution, and by consenting to carry it Congress do not acquire that exclusive power which they have to convey *legitimate* mail matter; in the other, Congress exceeds its power by overstepping the bound-

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* By "packets," packets of letters, packets of newspapers, and the like were
54 undoubtedly intended; that is, packets containing *intelligence* as distinguished from packets of mere *merchandise*. The purpose of the post had always been to transmit *intelligence* not *chattels*, and this definition of the expression must naturally have been suggested to the minds of those who used it, by the subject before them. This view is confirmed by the acts of Congress, which prohibit the transportation of "packets" between post towns except in the United States Mail. Of course, "packet" is here used in the sense suggested. See U. S. Rev. Statutes, §§ 3 982 to 3.985; U. S. *vs.* Chaloner, 1 Ware, 214.

ary which separates the right to *define** mail matter from the right to *regulate* its receipt, transportation and delivery.

So when the Constitution was adopted the people surrendered to the general government the *express power* to establish post offices and post roads; out of this flows the power to transport the 55
mail; and from the latter all such other *incidental* powers as are necessary and proper,—for example, to punish robbery of the mail, a crime destructive of postal benefits; to provide for officials and agents, without whom the mail could not be transported; to make contracts for transportation; to fix and charge rates of postage for the purpose of raising a revenue to sustain and keep the system in operation; to prohibit the carriage or delivery of mail matter upon which the proper postage is not paid, a power clearly necessary to enforce payment 56
of legal rates; and to prohibit others from carrying mails, a power necessary to prevent disastrous competition.

But the right to prohibit the transportation by mail of any *letters* or *packets* which were understood to be mail matter when the Constitution was adopted, was not expressly given by the people; in fact the conclusion seems inevitable from the

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* Consenting to carry merchandize, money orders, postal cards, &c., a power which Congress has, can hardly be regarded as *defining* mail matter. These articles 57
may be received into or excluded from the mails, at the pleasure of Congress; and individuals or corporations may compete with the mails in their transportation, with impunity: but as to *intelligence contained in letters and packets*, Congress have no power to define or exclude, and no competition can be carried on. The constitutionality of the laws ofCongress forbidding the transportation of letters and packets otherwise than by means of the Federal post, is as readily conceded as would be the unconstitutionality of a law attempting to prohibit such a transportation of chattels. The evident reason of the distinction is, that the power of Congress to carry *mail matter*, is exclusive; but a mere *chattel* is not mail matter, because not so recognized when the constitution was adopted, and, therefore, Congress have no power to make it such, though they may *consent* to carry it.

guarded language of the grant and in the light of the circumstances under which it was conferred that this right was expressly withheld. Nor is the exercise of such a right a necessary, appropriate or proper *means* for carrying into effect any express or implied power which the people did confer; but, on the contrary, the
58 *duty* of the government to carry *all letters and packets* is as clear an implication from the language of the Constitution (reference being had to the circumstances under which it was adopted) as any implied *power* which they have exercised.

In the articles of confederation the grant was only to establish Post-Offices—the right to establish post-roads not being included. And though in practice it was held that the confederate Congress had under the grant as it stood, the right to superintend the transportation of the mail, it was doubted
59 whether they had the right to establish post-roads.

(Dickey vs. Maysville, *supra.*)

To remove that doubt seems to have been the object of the additional power conferred in the Constitution. Is it not noteworthy that *only that additional power* was given? And that the grant in the Articles of Confederation—not a grant of general sovereign power over the subject such as was possessed by the English Government, was not made so in the Constitution? Does not the presumption irresistibly arise from this that the people did not
60 intend to confer sovereign power, but only intended to add specific limited power to the limited power theretofore possessed by the Confederate Congress.

The conceded power to refuse to carry letters upon which the proper postage has not been paid, must not be confounded with the power now claimed

by Congress of *absolutely* refusing to carry *certain* letters. The first is a power necessary to make the grant effectual and perpetuate the system,—its object and effect is not to *prohibit*, but only to *regulate*; while the latter is not a *regulation*, but a *prohibition*, and a prohibition in no wise an incident of the express grant, but in direct antagonism to it. 61

The Practice of Congress.

At the first session of Congress, after the Constitution and on the 22nd Sept., 1789, the power to establish post-offices and post-roads was temporarily exercised by that body and has ever since been retained.

1 Story's Laws of U S., p. 50.

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From the First Congress to the Fortieth, no provision appears in all the various acts, which, in any manner, attempts to interfere with the long established character of mail matter. Mail matter (we use the expression for convenience) was made to comprise a variety of articles not theretofore mail matter, but was never contracted so as to exclude any character of *letters*. Congress had not yet discovered that the power to hinder, impede, and interfere with the passage of any character of letters through the post, or to exclude them therefrom, was a necessary, proper, or appropriate *means* of transporting the mail, or in any wise an incident of the Constitutional grant. 63

Their great object was, (in accord with the evident intention of the framers of the Constitution, and with the clear import of the constitional grant,) to facilitate the transportation of *all letters and*

packets, subject only to the payment of reasonable rates of postage.

It is true we find in an Act of 1797, (1 St. at L., 512, § 6;) that "no newspapers shall be received by the deputy postmaster, to be conveyed by post, unless they are sufficiently dried and enclosed in
64 proper wrappers, on which, besides the directions, shall be noted the number of papers which are enclosed for subscribers and the number for printers." But this restriction is in no way analogous to the one under consideration. It does not *prohibit* the passage of a particular packet through the mails; but, for protection to other mail matter, for convenience and expedition, and because printers received their newspapers free of postage, (see 1 St. at L., 362, Ch. 23, § 21, Laws of 1794), reasonably requires the packet to be in a certain condition before mailing. It is a mere *regulation*.
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So the refusal to carry mail matter not prepaid; packages over four pounds in weight, (R. S., § 3,879;) liquids, poisons, glass, explosives and articles which might injure the contents of the bag, or the person of an employee, (id., § 3,878,) is a mere *regulation*. And most, if not all of these articles, may be excluded in the discretion of Congress, solely because they are not within the class of legitimate mail matter.

We also find that Congress has always maintained
66 the right to limit the weight and bulk of packets which shall be carried in the mail; and to refuse those of greater weight or bulk. This right, as already observed, is not inconsistent with our proposition. Packets are, and were always understood to be small bundles, (*vide* Webster's and Worcester's Dictionaries,) and the people never expected Congress to carry express or freight packages in the

post. Hence, the refusal to carry packets of above a certain weight or bulk, is not a violation of any duty which may be implied from the grant.

One effort, and only one, was ever made in Congress, prior to the original passage of the Statute before us, to prohibit the conveyance and delivery of established mail matter through the United States mails. A history of that effort may be useful as well as interesting, inasmuch as Chief Justice Marshall observes in his opinion, in the case of McCulloch *v.* Maryland, (4 Wheaton, 404,) that a doubtful question, "one on which human reason may pause, and the human judgment be suspended, * * * if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice." 67

In 1836, President Jackson, in his message to Congress, recommended the passage of an Act to prohibit the circulation of "incendiary" papers, etc., through the mails; and during the session, Senator John C. Calhoun moved the appointment of a special Senate committee, upon this branch of the message. (Cong. Gl., (1836) pp. 36–7.) 68

Mr. Calhoun was made Chairman of the Committee, and all his associates but one were Southern Senators. He reported back a bill providing that it should not be lawful for any deputy postmaster knowingly to receive and put into the mail, any pamphlet, newspaper, handbill, or other printed, written, or pictorial representation touching the subject of slavery, directed to any person or post office, where, by the laws thereof, their circulation was prohibited. (Id., 150.) 69

The bill came up for debate several times during the session. Mr. Calhoun demanded its passage,

not upon the ground that Congress had a right to prohibit the carrying of established mail matter, but on the ground that Congress owed each State a duty, not to permit the postal service to be used as an agent for the circulation, in any particular State, of papers or documents, which, by the laws of that State, were contraband.

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Senator Buchanan, (afterwards President,) on the other hand, put his demand for its passage, upon the broad ground that Congress was empowered to pass such a bill by the Constitution, saying: "Our power to pass the bill is perfect and complete in itself under the Federal Constitution, *or it has no existence*," (Id., App. 437.) Mr. Buchanan repudiated the position taken by Mr. Calhoun.

In one of the debates upon the bill, Senator Davis (of Massachusetts) used language in reference
71 to it that is equally appropriate here. He said:—

> "It would be claiming on the part of the government a monopoly—an exclusive right either to send such papers as it pleased, or to deny the privilege of sending them through the mail. *Once establish the precedent, and where will it lead to?* The goverument may take it into its head to inhibit the transmission of political, religious or even moral or philosphical publications, in which it might fancy there was something offensive; and under this reserved right, contended for in this report, it would be the duty of the government to carry it into effect." (id., p. 288.)

And Mr. Clay, in opposition to the bill said:—

72 "When I saw that the exercise of a most extraordinary and dangerous power had been announced by the head of the Post Office, and that it had been sustained by the President's message, I turned my attention to the subject and inquired whether it was necessary that the general government should, *under any circumstances*, exercise such a power, *and whether they possessed it*. And after much reflection, I have come to the conclusion that *they could not pass any law interfering with the subject in any shape or form whatever*. The evil complained of was the circula-

tion of papers having a certain tendency. The papers, *unless circulated, and while in the Post Office or mail, can do no harm; it is the circulation solely;* the taking them out of the mail and the use to be made of them, that constitutes the evil. *Then it is perfectly competent to the State authorities to apply the remedy.* The instant that a prohibited paper is handed out, whether to a citizen or a sojourner, he is subject to the laws which compel him either to surrender or burn it.

* * * * * * * * * 73

"Whence does Congress derive the power to pass this law? It is said that it is to carry into effect the laws of the State; but I thought that the only authority of Congress to pass laws was in pursuance of the Constitution. To pass laws to carry into effect the laws of the States is a most prolific authority, and there is no knowing where it is to stop; it would make the legislation of Congress dependent upon the legislation of twenty-four different sovereignties. The Senator from Pennsylvania (Buchanan) asked if the Post Office power did not give Congress the right to regulate what shall be carried in the mails. * * * *If such a doctrine prevail, the government may designate the persons or parties or classes who shall have the benefit of the mails, excluding all others.* (Id., App., 439.)

The bill was lost by a vote of 19 (principally 74
southern Senators) to 25. Among those voting with the majority were Senators Benton, Clay, Crittenden, Davis and Webster.

This was the first expression of either House of Congress upon their right to pass such a law; and it was not until the year 1868 that they made the startling discovery that one of the incidental powers necessary or proper* to carry into effect the express grant to establish post offices and post roads (and therefore a grant by implication), was the right to
declare what class of letters *with respect to the char-* 75
acter of the communication contained in them should be considered mail matter; and this, notwithstanding the fact that from the adoption of the

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* Wherever we use this expression, we use it in the sense defined by Chief Justice Marshal, to wit: *appropriate to the end.*

British Act of 1710, and even before, down to the year 1868, *all letters, whatsoever*, were mail matter.

The Act of 1868 has no bearing except that it is the first of this species of legislation; but at the second session of the forty-second Congress on the 8th of June, 1872, (17 St. at L., 302, § 149) Congress
76 provided that it should not be lawful to convey by mail, nor to deposit in a post office to be sent by mail, any *letters or circulars concerning illegal lotteries, &c.*, and prescribed a punishment for violations.

This provision is the same as the section of the Revised Statutes as amended, now under consideration, except that the *legality* of the lottery to which the letters refer is no longer material. We may, therefore, consider whether this, the first complete act of its character, is constitutional; for if it is,
77 there is no limitation to the power of Congress to prohibit the transportation of letters.

If they have the right to refuse to convey letters concerning *illegal* lotteries, they have the power to refuse to carry letters concerning *legal* lotteries; and if they refuse these, they may refuse *business* letters of all kinds, or love letters, or letters between husband and wife, or client and attorney, or physician and patient. And as the conveyance of letters otherwise than in the United States mail (R. S., p. 775,) is prohibited, they may deprive the people
78 of all means of communication by letter upon all subjects which may be objectionable to a majority in Congress. This is a power which Congress clearly do not possess.

Suppose Congress should prohibit the transportation of letters containing criticisms of some particular individual, or individuals; or deistical, or

atheistical, or scientific discussions; or, suppose the Democratic Party, having a majority in Congress, and believing their political antagonists to be a dangerous organization, should prohibit the transportation of letters or circulars through the mails containing criticisms of the Democracy, or information with respect to the Republican Party, or favorable comments on the Republican policy. *Can it be conceived for a moment, that any such prohibition would be constitutional?* Yet, if Congress can prohibit the conveyance of letters containing information of one character, it can prohibit the conveyance of letters containing information of any other character. The right conceded in one particular is conceded in every particular. 79

Of course prohibtions of such an extreme character as those supposed are not to be anticipated; but however improbable, they are not impossible if the act before us is valid; and in the language of Webster in the McCullogh case, "*A question of constitutional power can hardly be made to depend on a question of more or less.*" (4 Wheat., 327.) 80

That Congress has the right—and the exclusive right—to carry the mail, we have already seen; but in its exercise (especially in its *exclusive* exercise) they cannot evade a duty which attaches to, and is inseparable from the *right.* The *duty* to receive, transport and deliver *all letters* becomes, in the very nature of an exclusive grant of the right to do so, inseparably attached to and a part of the grant, when that grant is accepted and exercised. The letter may be upon business, love, politics, art, literature, or religion; and may express any opinion, in any form of language, foreign or native, illiterate, inelegant, vulgar or refined,—Congress has no alternative but to carry it, provided the postage be 81

paid, and other appropriate or necessary *regulations* complied with.

As already intimated*, we are not to be understood as claiming that Congress cannot control *a certain kind* of mail matter—such matter as has been made "mail matter" by Congress; or, more properly
82 speaking, matter which Congress has, of its own volition, consented to treat as mail matter. This is not our proposition. Our contention is that as all *letters and packets* were mail matter at the time of the adoption of the Constitution, they must always be carried without restriction or qualification, except in the nature of reasonable *regulation*, while the *duty* of carrying the mails is imposed upon Congress. But whatever else Congress has subsequently chosen to make or treat as mail matter, they may alter, regulate or abolish at will. For instance, postal cards, postal money orders, mer-
83 chandise, &c., were unknown in connection with the post when the Constitution was adopted; the people then associated the post only with the transmission of intelligence through the medium of letters and papers. Congress has since voluntarily enlarged the catalogue of mailable articles and extended the uses of mail service, and to this extent any restrictions, qualifications or regulations may be made, which the whims of succeeding Federal Legislatures may suggest, even to abolishment; but with respect to *letters and packets* Congress has no alternative but to carry them, irrespective of the
84 intelligence they convey, or to abandon the postal system entirely, and remit the entire subject to the people with whom it originally rested.

The British Parliament can regulate the mail in any manner or to any extent; they may make it

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* See note of Counsel at page of Argument.

useless if they choose. The State Legislatures, within there respective jurisdictions, could have done the same, had the people not surrendered to the General Government a large proportion of their power respecting the mail, *i. e.*, the power of regulating transportation. But as they did not surrender their right to control the character of mailable letters, the General Government did not acquire 85
that right, and, so far as any power exists in Congress the right to mail letters of every description must remain inviolate until the people shall delegate the remainder of that general jurisdiction over the subject possessed by them at the adoption of the Constitution.

(See argument of Henry Clay cited above.)

Lottery Letters and Circulars.

If the people had conferred upon Congress 86
authority to regulate public morals, the statute before us would not be open to judicial criticism; but the people never conferred and Congress cannot exercise any such right, except where the General Government has territorial jurisdiction. (U. S. Const., Art. I, § 8, Sub'd 17.) Every State may determine each for itself whether lotteries shall be regarded and treated within its own borders as immoral or legitimate, and as they determine may declare them to be legal or illegal. The State declaring them to be illegal 87
may, perhaps, punish any act within its jurisdiction in their aid, which might include the act of depositing in the mail or receiving therefrom lottery letters or circulars; but the General Government cannot undertake to assist a State in enforcing such laws, (see arguments of Senators Buchanan and Clay, quoted above,) particularly when by

so doing it will interfere with the right of citizens of a State where the laws do not exist, and lotteries constitute a legal business. The citizens of such a State are, by the statute under review, wrongfully interfered with in the prosecution of their legitimate business transactions —the business of conducting lotteries being
88 there as legitimate within the laws, as any other lawful business; and it is immaterial whether the laws of the State where this alleged offense was committed permit or prohibit lotteries; the laws of Congress must be general and apply to all the people, but so long as lotteries are legal in any State a general law will operate against the citizens of that State, and therefore it will be wholly bad and cannot be enforced at all or anywhere. Lotteries are permitted in some of the States (see statutes of Kentucky and Louisiana for instance); and at the adoption
89 of the Constitution were legitimate business enterprises in nearly all.

That the States, respectively, have the right to permit lotteries to exist as a business there can be no doubt; and as the only method of correspondence allowed by law is through the United States mail, and as correspondence in respect to lotteries in States where they are legalized is as lawful as correspondence in respect to any other subject, Congress cannot prohibit the mailing of such correspondence in such States, (and therefore cannot prohibit at all)
90 without unconstitutionally abridging private rights.

"The citizens of each State have the undoubted right to pursue all avocations that are authorized by the laws of that State, and Congress has no authority to prohibit them the use of the mail because it may differ as to the propriety or morality

of any pursuits which are so authorized. * * * Some of the States have thought proper to prohibit entirely the traffic in ardent spirits, and it cannot be denied that the use of the intoxicating beverage is far more injurious to the human race in the United States, as well as elsewhere, than all the forms of gambling and swindling combined; and yet will it be pretended that Congress has the power to refuse the use of the mails to distillers of and dealers in acholic liquors, when they are seeking to make use of them for the purpose of advancing their regular and ligitimate business." *

91

Judge Blatchford's Opinion.

Any consideration of the subject before us would be incomplete without an examination of the very ably expressed views of the Judge who delivered the opinion of the Circuit Court when the Petitioner raised this question there.

92

See Exhibit B, Record, page 13.

When the learned Judge asserts that "Congress has at various times exercised the power of excluding from the mail various articles, capable of being conveyed in sealed letter envelopes," [Record, folio 45,] he seems to misapprehend the argument. Whether or not the practice of Congress to which he refers, dating as it does no further back than 1872, should greatly influence the Court, is immaterial, and therefore requires no comment, for the contention is, that Congress cannot prohibit the mailing of letters containing a certain character of *intelligence*—not that they cannot prohibit the mailing of *articles*.

93

* Extract from brief of Joseph P. Horner and Thomas J. Semmes, recently laid before the Postmaster-General, in the case of the Louisiana State Lottery.

And we are in entire accord with the proposition [Record, folio 52, 53] that Congress "is empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution," and that the *necessity* spoken of in the clause which gives Congress power to make all laws which shall be *necessary* and proper to carry into
94 execution the powers conferred "is not to be understood as an absolute one, but Congress is to be allowed that discretion with respect to the means by which the powers conferred on it are to be carried into execution, which will enable it to discharge the high duties assigned to it in the manner most beneficial to the people." We also agree that "if the end is legitimate and within the scope of the Constitution, then all means which are appropriate and are plainly adapted to that end, and are not prohibited but consist with the letter and the spirit of the Constitution, are Constitutional." But we assert that
95 this very principle of construction, a principle most firmly imbedded in our constitutional jurisprudence, must destroy the statute before us. To demonstrate:

1. The *end* must be legitimate and within the scope of the Constitution; *i. e.*, Congress can seek only such ends as are authorized by the Constitution.

2. The *end* authorized by the Constitution, and which Congress has power to seek, respecting postal matters, is the establishment of post offices and
96 post roads, and the transportation of the mail.

3. The *end* aimed at in the statute before us is not the establishment of a post office or of a post road, nor is it the transportation of mail matter; it is, to *prevent* the dissemination of certain intelligence—to *prohibit*, not to facilitate, the transportation of mail matter.

4. And considered as a *means*, how can this statute be said to be appropriate and plainly adapted to the purpose of establishing post offices and post roads, or transporting the mail, when its whole tendency is to accomplish a result directly the reverse?

We submit, with profound respect, that the illustration of the subject before the Court, by reference to the bankruptcy laws, is not apt. [Record, folio 56, 57.] In the cases cited to support the illustrative principle, the contentions were in opposition to the power of Congress to *extend* the application of bankruptcy laws to cases, parties, and terms not comprehended in the English bankruptcy statutes in force at the adoption of our Constitution. Had Congress attempted a *contraction* instead of an *extension* of the privileges of bankruptcy, there would have been more force in the illustration, inasmuch as there would have been some analogy. As it now stands, the bankruptcy illustration would be appropriate only if we were resisting the right of Congress to *extend* the privileges of the mail service beyond what they were at the adoption of the Constitution; whereas we are really resisting their right to *contract* those privileges as they then existed. 97 98

The learned Judge says: "It has been contended in respect to laws on that subject [bankruptcy] which have been enacted by Congress, that the power of Congress is limited to the principle on which the English bankruptcy system was founded when the Constitution was adopted, and cannot extend to authorizing *voluntary* bankruptcies." 99

But suppose Congress had prohibited *involuntary* bankruptcies?

He continues—"or to putting into bankruptcy others than traders."

But suppose Congress had *excluded* traders from the benefits of the act?

And then—"or to granting discharges without
100 the consent of creditors."

But suppose Congress had absolutely prohibited discharges to which creditors gave their assent?

These suggestions are not made for the purpose of insinuating that the courts would have taken a different view of such acts, but to more clearly indicate the utter want of analogy between his Honor's illustration and the subject to which it is applied.

101 The true distinction, between bankruptcy and postal legislation is, that with respect to the former, there is no limitation upon Congress except that whatever legislation is promulgated shall be uniform in its operation throughout the Union. The purpose was to secure *uniformity*, nothing more; and the entire subject, with this single restriction, was left to Congress as the only body whose action could secure uniformity. There was no *duty* imposed either as to *purpose* or *means*,* expressly or by implication whereas in respect to postal legislation the object was to secure mail conveniences to the people
102 of the entire Republic, unfettered by State boundaries, whereby all their correspondence, as well as other intelligence, might be speedily interchanged; therefore, Congress were not given absolute power

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* The language of this Constitutional provision is as follows: "To establish * * * uniform laws on the subject of bankruptcies throughout the United States."

over the subject, but were only authorized to provide ways and means; and this authority carries with it a *duty* to permit the ways and means provided to be used for the purpose intended.

No more apt is the illustration by reference to the admiralty and maritime jurisdiction of the United States. [Record, folios 58, 59.] As the learned 103
Judge truly says, "In England, in the text-books and the decisions the jurisdiction of the admiralty had always been spoken of as confined to tide-water, tide-water and navigable water being in England synonymous terms, and 'tide-water' meaning in England nothing more than public rivers as contra-distinguished from private ones," and yet since the decision of Propeller Genessee Chief *vs.* Fitzhugh, the Courts have held that the admiralty jurisdiction of the United States extends "to all public navigable waters whether influenced by the tide or not." 104
Here, again, the mistake is in comparing matters of *extension* (so to speak) with matters of *contraction*. If we suppose the enactment by Congress of a law assuming for the Federal Courts exclusive admiralty jurisdiction, prohibiting all other Courts from adjudicating upon admiralty questions, and closing the Federal Courts to all admiralty disputes arising upon *tide-waters* we should have a statute more analogous to the one under review, and the admiralty power for purposes of adverse illustration would disappear. The people would then be deprived of a tribunal for the adjudication of admiralty causes arising upon tide waters. Could such an act be sustained? 105
And if not, would the reason be any other than that certain disputes arising upon tide-waters were at the adoption of the Constitution well established subjects of admiralty jurisdiction, and that the people of the Union had secured to themselves the right to have such disputes adjudicated by the judi-

cial power of the United States? Did not the people, in conferring the *power* impose a corresponding *duty?* And did not they do precisely the same thing in respect to the mails? And however much the privileges thus secured to the people may be *extended* or *expanded* by the Government, has the government any power to *contract* those privileges?

106

If, as Judge Blatchford truly says, the Constitution "is to be construed according to the fair and reasonable import of its terms," [Record, folio 60], may it not be laid down as a sound principle that *where, by the fair and reasonable import of the terms of any part of the Constitution, it appears that the people intended to secure a convenience or privilege to themselves through the agency of the Federal power, the Government, while it may* EXTEND, EXPAND, *or* ENHANCE *that convenience or privilege, has no power to* CONTRACT *or* ABRIDGE?

107

The argument that the Courts cannot control the discretion of Congress, meets our entire approbation [Record, folios 61 to 65,] and calls for no remark except that the very question is, whether Congress have, under the Constitution, any *discretion* whatever, in the premises. If they have, it is conceded the Courts cannot interfere, and the only remedy for abuse is at the ballot-box; but if they have not the Courts are bound to interfere.

The only other clause in the opinion of the Court
108 below demanding comment is the suggestion: "Whether the provisions of law which forbid and punish the carrying of letters outside of the mail will be construed as applying to letters which Congress forbids to be carried in the mail, is a question which does not arise in this case." [Record, folio 63.]

It seems to us sufficient to refer to that portion of

our argument,* which shows, as we humbly conceive, the right of Congress to carry the mail, to be *exclusive*, and to add, that if the right to carry the *mail* is exclusive in Congress, and *letters* are a component part of the mail, Congress has the right to prohibit the carriage of letters by others. The latter right they have exercised,† and made it unlawful (constitutionally, we submit,) to convey *any letters, irrespective of the intelligence they contain, through other channels* than the mail, and irrespective of the fact that they refuse to carry certain letters in the mail. 109

To the illustrations submitted by Judge Blatchford, and which we have reviewed, we might add one or two, which seem to us more in harmony with the subject under consideration. For instance:

Congress has power "to borrow money on the credit of the United States." Art. I, § 8, subd. 2. 110

Does not this *power* carry with it a corresponding *duty* to repay the money borrowed? And would an act of Congress be held to be constitutional which prohibited the payment of money borrowed, if the question were properly raised before a Court having lawful jurisdiction of the subject and parties?

And they have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of government." Art. I., § 8, subd. 17. 111

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* Ante page 5.

† R. S., §§ 39, 88-3-4-5.

Does not this *power* carry with it a corresponding *duty* to extend the equal protection of the laws to all residents of this district? And would an act of Congress, destructive of the private rights of such residents as they existed at the date of cession, be constitutional?

112

Conclusion.

Having stated the express and implied powers of Congress in respect to the mails,* and shown these powers to be exclusive,† we asked the Court to consider a series of propositions which establish the conclusion we assert. The first of these was that "when by the fair and reasonable import of the terms of any part of the Constitution, it appears that the people intended to obtain a privilege through the agency of the General Government, and
113 to that end conferred an exclusive right or power upon Congress; that right or power when exercised by Congress carries with it the duty of permitting the enjoyment of the privilege sought."§ This is self-evident. Congress cannot exercise such a power in a manner destructive of the very privilege to secure which the power was given.

Our next proposition was that "by the fair and reasonable import of the terms of that provision of the Constitution which confers upon Congress the power to establish post offices and post roads (and
114 by which it was also intended to confer the power to use the offices and roads established and to make

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* Ante, folios 10 to 14.

† Ante, folios 18 to 19.

§ Ante, folio 21.

both powers exclusive) it appears that the people did intend to obtain a privilege."*

In support of this we have shown that all civilized peoples had enjoyed the privilege of a public post; that there had been post roads, post houses, and means of transmission; and that the privilege was enjoyed to a high degree, for the age, at the adoption 115
of our Constitution by our own and the English people. The use of the post at this time was for the benefit of the people; they enjoyed it, and its advantages were peculiarly theirs. It was not in use for the purpose of revenue, and was in nowise a benefit to the Sovereign except as the comfort of his subjects would naturally redound to his benefit. Emphatically it had become a privilege of the people, and when they conferred the authority to establish it throughout the United States upon Congress, they intended to secure a privilege to themselves and 116
not to confer a sovereign power. Revenue or other advantage to the Government was not the motive of the grant, and the matter was considered only as a "public conveniency" and a means of "facilitating the intercourse between the States."

James Madison in No. 42 of the Federalist.

Assuming this proposition to be satisfactorily established, we pass to our third, which is that the privilege the people intended to obtain was a speedy, regular and uninterrupted transmission of mail matter.† The history of the postal service 117
which we have presented, shows that *speed* and *regularly* of transmission have always been its objects. But we discover that *uninterrupted* transmission of mail matter was not enjoyed by the

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* Ante, folio 21.

† Ante, folio 22.

people at the adoption of our Constitution; on the contrary, the sovereign under whom we had lived and the ruling powers elsewhere possessed and exercised the power of interrupting, detaining, breaking the seals and inspecting the contents of mail matter; and if the people had conferred sovereign authority over the subject upon Congress this arbi-
118 trary power would have vested in them. But fully appreciating the abuse to which such a power was liable, they entrusted the management of the postal privilege to Congress in language so cautiously and guardedly framed as to leave no doubt of their intention to confer no greater power than the right to provide and use ways and means of transporting mail matter.

If we have been successful in establishing these three propositions we are now entitled to draw this conclusion: That as by the postal clause in the
119 Constitution the people intended to procure to themselves the privilege of a speedy, regular, and uninterrupted transportation of their mail matter, and to that end conferred upon Congress the exclusive powers embraced in the clause; therefore, those powers, when exercised, carry with them the duty of permitting to the people the enjoyment of the privilege of a speedy, regular, and uninterrupted transportation of their mail matter.

And this brings us to our fourth proposition,
120 which is an inquiry into the meaning of that mail matter which the people are entitled to have speedily, regularly, and uninterruptedly transported.* Upon this point our history of the postal service shows that the purpose of the post has always been

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* Ante, folio 22.

to convey letters and packets containing intelligence. And this was the purpose at the adoption of the Constitution, as is shown by the frequent use of the term "*letters* and *packets*" in ancient documents; by Gov. Dongan's proposition to establish posts "*for the better correspondence between the Colonies;*"* by the British statute of 1710, which excepted letters concerning goods taken by common carriers, and which accompanied the goods, from the prohibition against the conveyance of letters by other persons than the Postmaster-General and his deputies;† and by our present general knowledge of the former uses of the post. 121

This leads to the conclusion which we asserted at the outset of our discussion of the duty of Congress, §that the postal power conferred upon Congress by the Constitution, when exercised, carried with it the duty of speedily, regularly, and uninterruptedly transporting intelligence contained in letter and packets. 122

Of course, there can be no dispute that the power conferred is exercised, and *exclusively*‡ exercised by Congress. This makes our argument complete, and the case presented to the Court may be stated as follows:

1. When, by a constitutional grant the people intended to procure a privilege to themselves, an exclusive exercise of the grant carries with it the *duty* of permitting the enjoyment of the privilege. 123

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* Ante, folio 33.

†Ante, folio 38

§ Ante, folio 22

‡ Ante, folio 16

2. By the postal grant the people did intend to procure a privilege to themselves.

3. The privilege which they intended to procure was the speedy, regular, and *uninterrupted* transmission of mail matter.

124 4. Mail matter as then understood was *intelligence contained in letters and packets.*

5. Congress has assumed to, and does, exclusively exercise the grant.

6. Therefore, it is the *duty* of Congress to speedily, regularly, and uninterruptedly transport all intelligence contained in letters and packets.

7. Any act of Congress which assumes to absolutely prohibit the mailing of, or to absolutely re-
125 fuse to transport and deliver, *any such letters or packets* is not within any of the incidental powers conferred by the grant, but is a violation of the duty imposed, a breach of the obligation assumed, and a void and unconstitutional statute.

8. Section 3,894 of the Revised Statutes does assume to absolutely prohibit the mailing of, and to absolutely refuse to transport and deliver *private letters containing a certain character of intelligence.*

If these propositions are correct the conclusion is
126 irresistible, that the statute under authority of which this Petitioner is imprisoned, is unconstitutional and void, and he is entitled to a discharge.

When this question was argued before the Circuit Court, the Petitioner's counsel suggested that if the statute were construed to apply only to *unsealed*

letters, it might be sustained. The record brought before that Court by the writ of certiorari to the Commissioner showed the fact to be that the circulars or letters mailed by the Petitioner were each enclosed in a *sealed* envelope.

(See opinion of Blatchford, J., Record, folio 40.) 127

But in the present proceeding the record does not show whether the envelope containing the letters or circulars for mailing which the Petitioner was convicted, was *sealed* or *unsealed*.

(See Indictment, Record, page 5.)

It may be proper, however, for this Court to inquire into the distinction, if any exists.

128 It is certain that if the statute were construed to mean *unsealed* letters only, it would be more consistent with itself. The statute provides that the objectionable letters *shall not be carried in the mail*, and this provision is the very corner-stone of the law. Now, if the law is construed to refer to *sealed* as well as *unsealed* letters, it asserts an absurdity—provides that certain letters shall not be conveyed by mail, the character of which letters cannot possibly be discovered until they have made their journey and passed out of the control of the postal authorities; nor then except by the recipient or 129 those acting under his authority.

One of the Federal statutes provides that when one postage is not prepaid on a letter, the letter shall not be carried. If the case arises, it is at once known, the postmaster refuses to forward, *and the letter is not carried*. So the law is consistent.

Another provides that packets above a certain weight shall not be carried in the mail. If such a packet is offered, its unmailable character is known at once, and it may be refused. *It is not carried*, and this law is also consistent.

130 So if we read the statute before us as prohibiting the carriage in the mail, of *unsealed* letters, referring to lotteries, the letters are open to inspection when deposited, their unmailable character may be at once discovered and *they need not be carried*. This law would then be consistent. But if it is to be construed as applicable to *sealed* letters, no case can arise where it will be possibe for the postmaster to perform his duty, (unless Congress gives him power to *open* all sealed letters), and the Government will be *compelled* to carry the prohibited matter.

131 But probably the strongest reason for the limited construction is, that a law which prohibits the transportation of *unsealed* letters containing a certain character of intelligence, is only a *regulation;* whereas, if the law is extended in its application to all letters, it becomes a *prohibition.*

Congress might say, letters concerning lotteries, or the liquor traffic, or medical advice in certain cases, or upon this subject or that subject, shall be enclosed in *sealed* envelopes, and unless so enclosed
132 shall not be carried in the mails; and they might add that all letters *under seal* shall pay a fixed additional postage. All this would be mere matter of *regulation;* and, as the mails would still be open for the transmission of all kinds of intelligence in letters and packets, there would be no infraction of Congressional duty.

If the limited construction is adopted, the people would not be deprived of their right to send letters containing information of any character they choose to forward; it would only require certain communications to be sealed, and possibly to pay a greater rate of postage —clearly, only a *regulation.* But if we adopt the broad construction the law ceases to be a *regulation* and becomes *prohibitory*, and we assume that Congress intended to exercise—whether they have it or not—that most despotic power, a *censorship of private correspondence.* 133

Respectfully Submitted,

A. J. DITTENHOEFER,
LOUIS F. POST,
Counsel for Petitioner.

2ª Parte Bollettino

4 Gennaio 93.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

No. 6, Original.—October Term, 1877.

U. S. Supreme Court.

Ex Parte in the Matter of A. Orlando Jackson.	Petition for Writs of Habeas Corpus and Certiorari.

Brief for Petitioner in Reply.

I.

The Government raise the preliminary objection that there is no case presented for the issue of a writ of *habeas corpus*.

There seems to be no dispute respecting the *principle;* it is in the *application* that our views diverge. "If the judgment is *void*, the writ will lie; if good until reversed * * * * *habeas corpus* will not prevent its execution." (Brief for U. S., page 2.) The proposition is accepted by us as a correct and concise statement of the law.

We insist that the judgment here is *void*. The Cir-

cuit Court of the United States for the Southern District of New York, in which this judgment was pronounced, has no jurisdiction to pronounce a criminal judgment for any act, except by virtue of some law of Congress making that act a crime. If no law of Congress making the mailing of lottery letters a crime exists, the court had no jurisdiction to pronounce this judgment, and the judgment is a nullity. A law of Congress which that body has no power to pass, is no law; and if the statute under review is unconstitutional, it is as if none existed.

Counsel says: "The Circuit Court here had conferred upon it by Congress jurisdiction over the subject matter and over the person." This is true; and if Congress had power to confer such jurisdiction, the judgment, if bad, is only erroneous, not void. But, if Congress had no power over the subject matter, or over the person in relation to the subject matter, they could confer none upon the court; their act was a nullity, and all proceedings based upon it equally so.

Ex parte Parks, 93 *U. S.*, 18.

This case is cited by the Government. The distinction is obvious. The validity of the statute was not in question; the query was whether a certain act of the petitioner was within the purview of the statute. The District Court "had plenary jurisdiction both of the person, the place, the cause, and everything about it," which they acquired by a constitutional and valid law of Congress, and their judgment, rendered within the limits of this law, was manifestly within their power; if wrong it was erroneous, and not void.

Ex parte Watkins, 3 *Peters*, 203.

This case is also cited. The facts differ materially; no question of constitutional power in the court rendering the judgment was raised. The judgment was rendered by the Circuit Court of the District of Co-

lumbia, and this court held, without looking into the indictment, that "the judgment of a court of general criminal jurisdiction" justified the imprisonment, and a writ ought not to issue. To apply the reasoning of the opinion, which was entirely applicable in that case, to the case at bar, would be to argue that the Circuit Court for the Southern District of New York may assume jurisdiction in criminal cases where it has not been conferred by Congress (for if the act conferring it is unconstitutional it has not been conferred at all), and by entering judgment absolutely confirm the jurisdiction so arbitrarily assumed.

It will be observed that the Circuit Court of the District of Columbia had *general* criminal jurisdiction, while the Circuit Court for the Southern District of New York is limited to such jurisdiction as Congress has by *constitutional* laws conferred upon it.

Ex parte Cabrera, 1 Wash. C. C., 232.
Hubbard *v.* Northern R. R., 3 Blatchf., 84.
U. S. *v.* Hudson *et al.*, 7 Cr., 32.

Sheldon vs. *Newton*, 3 *Ohio St.*, 499.

This case is also cited. The question was whether the effect of the final order of a court can be made to depend upon the records disclosing such a state of facts to have been shown in evidence as to warrant the exercise of its authority. Clearly different from the question here. We quote from the opinion, however, in support of our own position: "If the court has jurisdiction of the subject matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been, its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. *On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct and precisely certain in point of form its record may appear, its judg-*

ment is void to every intent and for every purpose, and must be so declared by every court in which it is presented."

Precisely this case. The court had no jurisdiction except such as it derived from an unconstitutional and void statute.

The authorities which define jurisdiction as the power "to hear and determine," require no examination. The definition is not questioned. But it is of no assistance here. If the Circuit Court had power to hear and determine, they had jurisdiction; but they could only acquire that power from Congress, and Congress could only acquire the power to confer it from the people. If Congress did not receive the power from the people, their act conferring it upon the court is a nullity, and the court is without jurisdiction.

Upon this general subject, in addition to the able opinion of Clifford J., in the Lange case already cited, we submit the case of the People, *ex. rel.* Tweed *vs.* Liscomb, 60 N. Y., 559.

It is argued that power to decide to dismiss the complaint because of the unconstitutionality of the enactment upon which it is founded, implies power to decide differently. (Brief, page 2.)

The same might be said of all questions of jurisdiction; that is, the power to decide to dismiss a proceeding for want of jurisdiction, implies power to decide that there is jurisdiction. But the proposition is not sound. If it were, a void judgment for want of jurisdiction could never exist; all bad judgments would be voidable only; for the judgment itself would be conclusive evidence until reversed, that the court had jurisdiction over subject and person. It is true that a court may act upon a proceeding pending before it so far as to determine whether there is jurisdiction or not; but if it decides that there is jurisdiction when in fact there is none, it so decides at its peril, and that

decision, and all orders and proceedings under or in pursuance of it are nullities.

Bank *v.* Judson, 8 N. Y., 254, and citations.

People *v.* Sturtevant, 9 Id., 264, and citations.

Dobson *v.* Pearce, 12 N. Y., 164.

All the authorities which hold that a judgment for want of jurisdiction is void (and they abound in the various reports, both State and Federal), necessarily acquiesce in this proposition, that even though a court may dismiss a proceeding because it has not jurisdiction over the subject, its decision that it has jurisdiction when in fact none exists, is void.

II.

If we are wrong in our practice in not having first brought the prisoner before the Circuit Court upon a writ, and then prayed the writ here by way of appeal, as suggested on page 4 of the government brief, it is due to the fact that we had previously raised before the Circuit Court the very question we seek to raise here, by bringing this prisoner before that court after his commitment by the magistrate for the same offense. In that proceeding the Circuit Court dismissed the writ, and filed a lengthy opinion, which we bring here attached to our petition. It is obvious that an application now to the Circuit Court before coming here would be a formality. If it is required, we may go through the form and reach this court properly at a later day.

But we submit that the Yerger case is not an authority against our practice. All that seems to be required by that case is, that before the writ issues from

this court, the Circuit Court shall pass upon the lawfulness of the imprisonment. That court has done so by the commitment.

In the Yerger case (8 Wall, 85), the original proceedings were before a military commission; the prisoner was brought before the Circuit Court by writ of *habeas corpus*, and then the writ issued from this court. In the Parks case (93 U. S., 18), the original proceedings were in the District Court, whence they were taken by writs to the Circuit Court, and then the writ was allowed by this court. But in the Watkins case (3 Peters, 203), the original proceedings, as in this case, were in the Circuit Court, and the writ was issued directly from this court.

While in ordinary cases it might not be desirable to allow the writ here until the court below have examined the question upon a writ issued by them for that purpose; yet in this case, for all purposes, except to meet the requirements of positive law, that was substantially done when the cause was argued in the Circuit Court before Judge Blatchford.

Respectfully submitted,

A. J. Dittenhoefer,
Louis F. Post,
Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 6, ORIGINAL. EX PARTE A. ORLANDO JACKSON, PETITIONER FOR HABEAS CORPUS.

Respdts. ans. to rule - & brief.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 6, ORIGINAL. EX PARTE A. ORLANDO JACKSON, PETITIONER FOR HABEAS CORPUS.

And now, on the return day of the rule in this cause, the Attorney-General of the United States, in behalf of himself and of those upon whom the petition and exhibits in this case were served, conformably to the order of court made March 26, 1878, comes and says that writs of habeas corpus and of certiorari should not issue as prayed for, because he says said petition and exhibits do not make out a case in which this court has jurisdiction to order said writs to issue, and that said Jackson is in lawful custody, under and by virtue of the proceedings and sentence mentioned in said exhibits and upon the commitment issued thereon.

CHARLES DEVENS,
Attorney-General,
By EDWIN B. SMITH,
Assistant Attorney-General.

BRIEF.

The prisoner is imprisoned under conviction and sentence for having deposited in the mail circulars concerning lotteries, contrary to the provisions of R. S., sect. 3894, as amended by the act of July 12, 1876, c. 186, § 2 (19 Stats., 90).

I.

This does not present a case upon the face of the petition for the issue of a writ of habeas corpus.

Ex parte Parks (93 U. S., 18).

Though this court doubtless *can* take jurisdiction, it has already declared it *will* not in such a case. (*Ib.*)

As there stated, the circuit court is the exclusive and final judge of its own jurisdiction under circumstances like the present.

Id., 23.

Ex p. Watkins (3 Peters, 203).

Sheldon *v.* Newton (3 Ohio Stat., 499).

It is enough that the circuit court had power to entertain the complaint. That gives jurisdiction. Power to decide that it must be dismissed because of the unconstitutionality of an enactment or for any other reason implies power to decide differently. It is jurisdiction. *Ib.*

Central Pac. R. R. Co. *v.* Placer Co. (43 Cal., 368-9).

Ex parte Bennett (44 Cal., 88).

King *v.* Poole (36 Barb., 242).

If the judgment is void, the ~~suit~~ writ will lie; if good until

reversed, as is the case here, habeas corpus will not prevent its execution. (See 3 Peters, 202, and other cases cited supra and infra; Ex. p. Bushnell, 9 Ohio St., 183; Ex. p. Williamson, 26 Penn. St., 9; People *v.* Orser, 12 Howd. Pr. (N. Y.), 550; Ex. p. Baker, 11 Howd. Pr., 425–6; Ex. p. Prime, 1 Barb., 349, 350; People *v.* Cavanagh, 2 Abb. Pr., 85; People *v.* McCormack, 4 Parker's Crim. Cas., 9; Ex. p. Van Aernam, 3 Blatch., 160.)

For causes of detention arising *after* judgment and execution, the writ may issue (People *v.* Cavanagh, 2 Parker's Crim. Cas., 650); that is, for a cause arising or existing after the decree and jurisdiction of the court is exhausted, as it was in Lange's case (18 Wall., 163). There the court had exhausted its power, and had no further authority or jurisdiction over the *person* or *cause*. (93 U. S., 23.)

The circuit court here had conferred upon it by Congress jurisdiction over the subject-matter and over the person. Whether the statute under examination was constitutional or not was a question of law, arising in the case, to be finally decided by that court, since no provision is made to review its determination of legal propositions in criminal cases.

Sheldon *v.* Newton (3 Ohio St., 499);
Ex p. Kellogg, (6 Vt., 509, 511);
Ex p. Tracy, (25 Vt., 93, 96);
Ex p. Greenough, (31 Vt., 279, 285);
Ex p. O'Connor, (6 Wis., 288.)

"If a plaintiff obtain a judgment, and by his own showing has no cause of action, yet if the court had jurisdiction of the cause, it is only an erroneous judg-

ment; but if the court has no jurisdiction of the cause, it is a void judgment."

McNamara on Nullities, 137, and authorities passim.

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action," &c.

United States *v.* Arredondo (6 Peters, 709);
King *v.* Poole (36 Barb., 242).

The issue of the writ of habeas corpus is an exercise of *appellate* power.

Ex p. Yerger (8 Wall., 85).

It is only as an appeal from the decree of the circuit court refusing to discharge the petitioner from his PRESENT imprisonment that the writ could be issued. (*Id.*, 103.) If this court, on such appeal, finds that the circuit court had jurisdiction over the cause and party in the original proceeding, it will not examine into the correctness of its determination of that case, but will say that the refusal to discharge was proper.

Again; *there has been no decision of the circuit court upon the legality of the imprisonment under the commitment;* consequently, there is nothing from which to appeal. Reference to the statement of the petition and to Judge Blatchford's opinion (Record 13, 14) shows that it was only *as to the imprisonment while held for trial* that he gave any decision; and from this judgment there was no appeal. (*Ib.*)

If attempt is again made to raise the question whether or not one can be lawfully imprisoned for refusal to pay a fine, even if that be properly imposed, the answer might be, perhaps, that this only raises the issue of the correctness of the judgment, not of its validity, till reversed. We prefer to stand, however, upon the entire propriety of such sentence. R. S., sects. 1041, 1042, 847, last clause, 5296 and 5548.

II.

Should the court be brought to the examination of that question, it will be found that R. S., sect. 3894, as amended by act of July 12, 1876, c. 186, § 2 (striking out the word "illegal," 19 Stats., 90), is constitutional.

As thus amended, it reads: "SEC. 3894. No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." See also Act of June 6, 1872, c. 335, § 149, 17 Stats., 302.

The eighth section of Article I of the Constitution confers the power "to establish post-offices and post-roads," and to make all laws necessary and proper for carrying into execution that power.

It meant to create an establishment as an entirety; not *merely* to designate the places at which mails should be taken up and delivered, and the routes by which they should be transported from point to point. It gave full, sovereign, control over the whole subject, to be exercised by any appropriate means.

Kohl *v.* United States (91 U. S., 367).
Dickey *v.* Turnpike Co. (7 Dana, 113).
Sturtevants *v.* Alton (3 McLean, 393).
2 Story on Const., §§ 1125 to 1150.
Rawle on the Const., ch. 9, pp. 103–4.

Having exclusive power over the subject, Congress can say what matter shall receive the benefits of this establishment; and he who complains that he cannot use it to facilitate obscene or improper communications no more defends a constitutional right than does the debtor who cannot avail himself of the bankrupt act because owing but a hundred dollars, or because (under the first law on this subject) not a trader. It is a question of administration merely. There is no constitutional right to compel the granting of privileges under the power to establish a system of bankruptcy or of mail communication. "The powers given are understood, in a large sense, to secure the public interests." (2 Story on Const., § 1134.) If these interests require the exclusion of articles morally contaminating, as well as of poisons, acids, or explosives, to prohibit their deposit in the post-office is the declaration of a right as "essential to the beneficial exercise of the power," though "not indispensably necessary to its existence," as any of those mentioned by Marshall, C. J., in McCulloch *v.* Maryland (4 Wheaton, 416, 417).

The remedy is in the hands of the people, if Congress so legislates as to deprive them of the full and just enjoyment of postal privileges.

If any State chooses to sanction a business which the Federal Congress thinks ought not to have the use of the mails to facilitate its transactions, that State can, if it please, provide means of communication for matter so excluded from the mails.

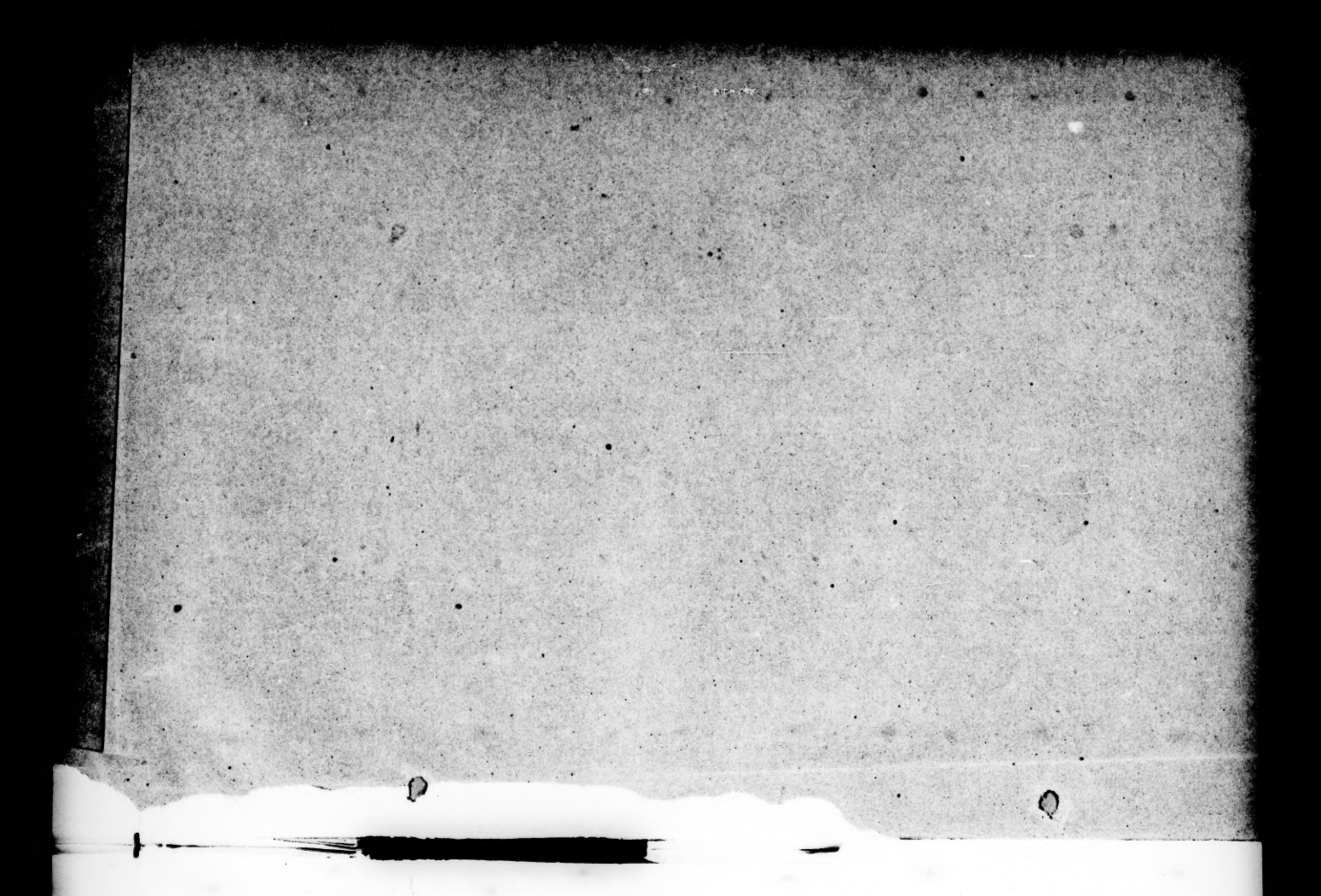
2 Story on Const., § 1150;

1 Tucker's Blackst. Com., App., 265.

But if there is *any* right of exclusion, the extent of its exercise is one of legislative discretion.

III.

Wherever the prisoner would not, upon his own showing, be discharged if brought before the court, the writ will not issue.

Ex p. Watkins, (3 Peters, 201, *et seq.*);
Ex p. Sims, (7 ~~Gray~~, 282); Cushing
Ex p. Bushnell, (8 Ohio St., 599);
Hobhouse's case, (3 B. & Ald., 420.)

EDWIN B. SMITH,
Assistant Attorney General.